

**HIGH COURT OF ORISSA: CUTTACK**

**W.P.(C) No.7120 of 2017**

In the matter of an application under Articles 226 and 227 of Constitution of India.

Sri Ajay Kumar Jain ..... Petitioner

-Versus-

State of Odisha and others ..... Opp. Parties

For Petitioner : M/s Prabodha Ch. Nayak  
& S.K.Rout

For Opp. Parties : Mr.R.K.Mohapatra, GA

Decided on 25.07.2017

**P R E S E N T:**

**THE HON'BLE THE CHIEF JUSTICE SHRI VINEET SARAN  
AND  
THE HONOURABLE SHRI JUSTICE K.R. MOHAPATRA**

**VINEET SARAN, CJ** This is a batch of writ petitions filed by some contractors challenging the condition, whereby, in response to tender call notice, they are required to furnish Additional Performance Security (APS) at the stage of submission of their bids in the form of bank draft or other specified modes

as a pre-condition to their participation in the tender process, if their bids are for amounts below the estimated cost as provided in the notice inviting tender.

2. W.P.(C) No.7120 of 2017 is being treated as the leading petition, in which counter and rejoinder affidavits have been exchanged. The counter affidavit filed in this writ petition has been adopted by the State Government in all other connected writ petitions, and copies of the same have been served on the respective learned counsel for the petitioners in other connected writ petitions. Rejoinder affidavit in the leading writ petition has been filed. Some other writ petitioners have also filed their rejoinder affidavits. As such, pleadings between the parties (to the extent as desired by the respective petitioners) have been exchanged and with the consent of learned counsel for the parties, these writ petitions are being disposed of at the admission stage.

3. The brief facts of the leading writ petition are that on 30.03.2017, a tender call notice (e-procurement notice) was issued by the Water Resources Department of Government of Odisha inviting tenders for canal and road

works. The tenders were invited for total 13 items. The cost of the tender paper for each item was Rs.10,500/-. The estimated cost of the work for each item, as well as the EMD/security amounting to 1% of the estimated cost, was also specified. Besides other conditions, condition no.6 required that a bidder was to provide Additional Performance Security at the time of submitting its bid. The relevant clause 6 is reproduced below:

“Additional performance security shall be obtained from the bidder, when the bid amount is less than the estimated cost put to tender. In such an event, the bidder who have quoted less bid price than the estimated cost put to tender shall have to furnish the exact amount of differential cost i.e. estimated cost put to tender minus the quoted amount as additional performance security in shape of Demand Draft/Term Deposit Receipt pledged in favour of the Executive Engineer, Lower Indra Canal Division, Khariar from work serial no.01 to 09 and office of the Executive Engineer, Lower Indra Dam Division, Damsite, Tikhali from work serial no.10 to 13 in the sealed envelope along with the price bid at the time of submission of bids. The bids of the technically qualified bidders will be opened for evaluation of the price bid in case of the bidders quoted less bid price/rate than the estimated cost put to tender and have not furnished the exact amount of differential cost (i.e. estimated cost put to tender minus the quoted amount) as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt, their price bid will not be taken into consideration for evaluation even if

they have qualified in the technical bid evaluation.”

*(emphasis supplied)*

4. The petitioner in this writ petition, being the ‘B’ Class licensed contractor duly registered under the Registration Rules, 1967, claims to be qualified to participate in the tender for each of the 13 works, but is aggrieved by the pre-condition imposed by Clause 6 of the tender call notice requiring him to provide APS for each of the items at the time of submission of the bid, which was in terms of the Office Memorandum dated 04.05.2016 issued by the Works Department of the Government of Odisha. The petitioner has thus prayed for quashing of the tender call notice dated 30.03.2017, as well as the Office Memorandum dated 04.05.2016. Besides this, the petitioner has also prayed for quashing of an earlier Office Memorandum dated 08.11.2013. In the leading writ petition bearing W.P.(C) No.7120 of 2017 as well as in certain other writ petitions, the prayer for quashing of the Office Memorandum dated 08.11.2013, imposing the condition of not accepting the bid below 15% of the estimated cost has also been challenged, besides certain other prayers.

5. Learned counsel for all the petitioners have jointly stated that in this batch of writ petitions, the question to be considered may be limited only with regard to the legality of the Office Memorandum dated 04.05.2016. They further made a prayer that in case the petitioners, who are still aggrieved with the Office Memorandum dated 08.11.2013 or wish to press any other prayer in their writ petitions, they may be permitted to file separate writ petitions in that regard, which shall be considered irrespective of their filing these writ petitions in which such questions/prayers have not been considered.

6. Such prayer of the learned counsel for the petitioners is accepted, and thus, in this writ petition, we are only considering the validity of the Office Memorandum dated 04.05.2016, and the condition imposed in the tender call notices in pursuance thereof.

7. We have heard Shri Prabodh Chandra Nayak, Shri Sukanta Kumar Dalai, Shri Asim Amitabh Dash, Shri Abhijit Pattnaik, Shri Jatindra Kumar Mohapatra and Shri S. Padhy, learned counsel for the petitioners, and Shri R.K. Mohapatra,

learned Government Advocate appearing for the State opposite parties and have perused the records.

8. The contention of the learned counsel for the petitioners is that the aforesaid pre-condition of furnishing the APS at the time of submission of bids is not provided for in the Odisha Public Works Department (OPWD) Code and, as such, the condition so imposed is contrary to law, which is restrictive in nature, and would be violative of Article 19(1)(g) of the Constitution of India. It is contended that because of the said condition as imposed, there would be lesser participants/bidders, which would mean lesser competition, meaning thereby the competitive price bids would not be available, and would thus cause financial loss to the State Exchequer. Such a system would favour those who are big and financially strong contractors/bidders, to the detriment of the smaller bidders, which would be violative of Article 14 of the Constitution of India. The contention is that by imposing such a pre-bid condition of providing APS, financial harassment would be caused to the bidders, because if the contractor is to participate in all the works for which tenders

are invited, he would have to first furnish APS for the difference of the estimated cost and the bid amount, where the same is less than the estimated cost, which otherwise the bidder would be required to furnish only if his bid is accepted and he is a successful bidder.

9. As an example, Sri P.C.Nayak, learned counsel for the petitioner in the leading writ petition has submitted, that if the petitioner wants to bid for all the 13 works for which the tender call notice has been issued on 30.3.2017, the petitioner would have to furnish APS for the differential amount in each of the 13 works, whereas earlier he would have to furnish APS only for the works for which his bid was successful. As a result of this, only financially very sound or moneyed contractor would be benefitted, even though the petitioner may be able to perform the work contract for lesser price, if he is allowed to participate in all the 13 works and required to furnish the APS at the time of entering into the contract for such items where he is declared to be successful bidder. The submission is that the purpose of furnishing APS is to ensure that the successful bidder entering into a

contract/agreement with the Department, gives additional security for the performance of the contract for the differential price between the estimated cost and the bid price, where it is lesser than the estimated cost. The interest of the Government Department is to be secured only where the contract is awarded and not prior to it. The apprehension of the State that the contractor, after submitting his bid at a price below the estimated cost may not thereafter enter into the agreement, is misconceived, as the Government Department issuing the tender call notice can always forfeit the EMD/Security Deposit furnished by the bidder, and also further initiate proceedings for blacklisting the contractor, and a further provision is there that the concerned Government Department shall inform all other Government Departments for blacklisting of such contractor, so that he may not be awarded contracts by other Government Departments. Besides this, it is submitted that the bidders have to also deposit the tender cost for each work separately, which is not refundable.



10. Learned counsel for the petitioners have also submitted that there is a distinction between the bid security and performance security. Performance security is to be furnished at the stage of performance of work, which is only after the contract is to be awarded in favour of the successful bidder and not earlier; whereas bid security is to be furnished at the stage of submitting the bid. Thus, the submission is that the bid security of 1% of the estimated cost is rightly required to be deposited at the stage of submission of bid, and the performance security by way of APS can be asked to be furnished only when the successful bidder is required to perform the contract. The contention, thus, is that no prejudice would be caused to the Government Departments if APS is provided at the time of execution of contract in favour of the successful bidder, as the interest of the Government Departments would be fully safeguarded. The apprehension that the successful bidder delays the execution of the agreement by not furnishing the APS is ill-founded, as terms of the tender call notice can always require the successful bidder to furnish APS within a

stipulated time after acceptance of his bid, failing which his bid would be cancelled and security deposit forfeited and the contractor be blacklisted, plus provision can also be made for recovering liquidated damages. It is thus contended that there is no reasonable nexus between the object of furnishing APS at the stage of submitting the bid, and there is also no reason given for imposing such pre-condition.

11. The other contention of the learned counsel for the petitioner is that such restriction as has been imposed by Office Memorandum dated 4.5.2016, cannot be considered to be classified as a law within the meaning of Article 13(3)(a) of the Constitution of India. It also restricts the scope of level playing field, which is being deprecated by judicial pronouncements. In the end, it was submitted that the restriction so imposed is not derived from any law or backed by any Government Rules, and thus cannot be imposed.

12. *Per Contra*, Sri R.K.Mohapatra, learned Government Advocate appearing for the opposite parties has submitted that furnishing of APS is not an alien concept, as the same was already there in terms of the Office

Memorandum dated 8.11.2013, and the provision of furnishing APS at the time of submission of bid was introduced as the Government had experienced that contractors were quoting unreasonably lesser price than the estimated cost, on which they could not work and thus, either they do not come forward to enter into agreement or leave the work unfinished in between. It is contended that because of the same, the Government suffered huge financial loss, as well as delay in completion of projects and as such, the condition was imposed in public interest, so that the public does not suffer, and money as well as time is also not wasted. It is contended that cancellation of the bids, where APS is not furnished, delays the entire process and at times, fresh tender call notice has to be issued, which is against public interest, which is paramount. He has thus contended that the condition so imposed by the Office Memorandum dated 4.5.2016 is fully justified in law and cannot be said to be contrary to the provisions of the OPWD Code or the Constitution, as the same is neither discriminatory nor does it impose any unreasonable restriction. Learned Government

Advocate has thus prayed that the writ petition deserves to be dismissed.

13. In support of their submissions, learned counsel for the parties have relied on certain decisions, which shall be considered while dealing with their arguments.

14. We have carefully considered the submissions advanced by the learned counsel for the parties and perused the records.

15. The brief background of the case is that contractors, who are licensed and registered under the relevant Rules, are eligible to participate in the tender process in response to tender call notice issued by various Departments of the Government of Odisha for carrying out the work contracts for the respective Government Departments.

16. In Office Memorandum dated 08.11.2013, it was provided that where the bid amount offered by a bidder was more than 10% less than the estimated cost, the successful bidder was required to provide APS by way of bank draft or other specified modes. By Office Memorandum dated

04.05.2016, the earlier Office Memorandum dated 08.11.2013 has been modified to the effect that the APS should be obtained from the bidder at the stage of submission of his bids, when the bid amount is less than the estimated cost put to tender. It is such pre-condition of furnishing APS at the stage of submission of the bid (and not by the successful bidder alone after his bid is accepted as provided earlier) which is under challenge in these present writ petitions.

17. For record, it may be noted at this stage that just prior to issuance of Office Memorandum dated 08.11.2013, another decision was taken on 26.10.2013 to the effect that the estimated cost be calculated after taking into account 7.5% as profit of the contractor and another 7.5% as overhead charges, and thus the State Government had come to the conclusion that the minimum viable cost at which a contractor could successfully perform the contract, should not be less than 15% of the estimated cost. Thus, a provision was incorporated in the Office Memorandum dated

08.11.2013 that those tenders in which the price quoted was below 15% of the estimated cost would not be considered.

18. For proper appraisal of the relevant clauses relating to the APS in the Office Memorandums dated 08.11.2013 and 04.05.2016 are reproduced below:

“OFFICE MEMORANDUM DATED 08.11.2013

**(2) Amendment to Para-3.5.14 of Note-I of OPWD Code, Vol-I by inclusion:**

*Note-I – If L-1 bidder does not turn up for agreement after finalization of the tender, then he shall be debarred from participation in bidding for three years and action will be taken to blacklist the contractor. In that case, the L-2 bidder, if fulfils, other required criteria would be called for drawing agreement for execution of work subject to the condition that L-2 bidder negotiates at par with the rate quoted by the L-1 bidder otherwise the tender will be cancelled. In case a contractor is blacklisted, it will be widely publicised and intimated to all departments of Government and also to Government of India agencies working in the state.*

**(3) Amendment to Appendix-IX, Clause 36 of OPWD Code, Vol-II by inclusion:**

*Clause No.36 – If the rate quoted by the bidder is less than 15% of the tendered amount, then such a bid shall be rejected and the tender shall be finalized basing on merits of rest bids. But if more than one bid is quoted at 14.99% (Decimals upto two numbers will be taken for all practical purposes) less than the estimated cost. The tender accepting authority will finalize the tender through a transparent lottery system, where all bidders/their authorized representatives the concerned Executive Engineer and DAO will remain present.*

**4.(A) Amendment to Para-3.5.5 (V) of Note-II of OPWD Code, Vol-I by substitution:**

*Note-(II) – When the bid amount is up to 10% less than the estimated cost, no additional performance security is required to be deposited. When the bid amount is less than the estimated cost by more than 10% and within 15%, in such an event, the successful bidder will deposit the additional performance security to the extent of 1.5 times of the differential cost of the bid amount and 90% of the estimated cost.”*

OFFICE MEMORANDUM DATED 04.05.2016

**(1)(A) Amendment to Para-3.5.5 (V) of Note-II of OPWD Code, Vol-I by modification:**

*Note-(II) – Additional Performance Security shall be obtained from the bidder when the bid amount is less than the estimated cost put to tender. In such an event, the bidders who have quoted less bid price/rates than the estimated cost put to tender shall have to furnish the exact amount of differential cost i.e. estimated cost put to tender minus the quoted amount as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt pledged in favour of the Divisional Officer in the sealed envelope along with the price bid at the time of submission of bids.*

*The bid of the technically qualified bidders will be opened for evaluation of the price bid. In case of the bidders quoting less bid price/rate than the estimated cost put to tender and have not furnished the exact amount of differential cost (i.e. estimated cost put to tender minus the quoted amount) as Additional Performance Security in shape of Demand Draft/Term Deposit Receipt, their price bid will not be taken into consideration for evaluation even if they have qualified in the technical bid evaluation.”*

*(emphasis supplied )*

19. It is clear from a plain reading of Office Memorandum dated 08.11.2013 quoted supra, that when the bid amount offered by a bidder is more than 10% less than the estimated cost, the successful bidder is required to provide APS by way of bank draft or by other specified mode as a security for performance of the contract. Subsequently, vide Office Memorandum dated 04.05.2016, the earlier memorandum dated 08.11.2013 was modified to the effect that APS should be obtained from the bidder at the stage of submission of the bid, when the bid amount is less than the estimated cost put to tender. Taking into consideration the rival contentions of the parties, it appears that in order to secure the performance of the contract awarded in favour of the successful bidder, the APS is being imposed, which is in addition to the other mode of security measure, in order to ensure timely performance of the contract. Sufficient measures are being taken under the provisions of the OPWD Code to ensure fair play in the evaluation process as well as performance of contract. A bidder is required to submit bid security @1% of the estimated cost at the time of submission



of the bid. Thus, the bidder would lose EMD if he backs out during the evaluation process. There are also other penal provisions in the OPWD Code to prevent any foul play by the bidder. Thus, there is no justification requiring the bidders to deposit APS at the time of bid, which in the nature of a performance security.

20. By the very nomenclature of “Additional Performance Security”, it is clear that the same is meant as security for performance of the contract, and unless the contract is entered into, there cannot be any occasion of furnishing Additional Performance Security. The performance security can thus be required to be deposited only by the successful bidder. It cannot be imposed upon the bidders for each of the items at the time of submission of their respective bid.

21. The submission of Mr.Nayak is that Article 19 (1)(g) of the Constitution provides all citizens a right to practise any profession, or to carry on any occupation, trade or business. Sub-clause (6) of Article-19 provides for restrictions on the right conferred under Article 19 (1)(g), to

the effect that nothing in Article 19(1) shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred under sub-clause (g). Thus, the right conferred under Article 19(1) (g) is always subject to the restriction made under any law for the time being in force. No enactment having been brought in the relevant law to put a condition of APS at the pre-bid stage, which, in other words, would prevent potential bidders from participating in the tender process, cannot sustain in the eyes of law by way of an enactment by the State Legislature.

22. Mr.R.K.Mohapatra, learned Government Advocate vehemently objected to the submissions of learned counsel for the petitioners, and submitted that APS at the pre-bid stage is being imposed for the public interest. Individual interest should also always pave way for the public interest. Thus, the requirement of submission of APS at the pre-bid stage cannot be faulted with. It is his submission that if the lowest bidder does not turn up and second lowest bidder

does not match with the price of the lowest bidder, then the authority has to invite fresh tender by making wide publication. In that process, it not only causes huge loss to the public exchequer, but also possibility of not completing the project within the stipulated period cannot be ruled out, which is definitely against the public interest. The submission of Mr.Mohapatra, learned GA cannot hold good for the reason, that the question of backing out from contract or leaving the job in the midway would arise in course of performance of a contract. It does not arise at the pre-bid stage. Submission of Mr.Mohapatra is essentially with regard to performance of contract awarded in favour of the successful bidder, so it does not stand to reason as to why APS should be imposed at the pre-bid stage. There is no reasonable nexus between the condition of imposition of APS at pre-bid stage and the object to be achieved by such imposition. OPWD Code provides sufficient security measures to avoid fake/irrelevant bids. In the guise of imposing further security measures to achieve the object, performance security cannot be imposed at the pre-bid stage.

In the case of **Union of India Vs. International Trading Co.**, reported in (2003) 5 SCC 437, Hon'ble Supreme Court at paragraph-23 has held as under:

*“23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interest of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.....”*

*(emphasis supplied)*

In the case at hand, by the restriction imposed at the pre-bid stage, the right of the potential bidders, who are otherwise eligible to participate in the tender process, is being arbitrarily infringed. It certainly curtails the reasonable expectation of the intending eligible bidders to participate in the bidding process.

In the case of **Association of Registration Plates Vs. Union of India and others**, reported in (2005) 1 SCC 679, Hon'ble Supreme Court at paragraph-43 held as under:

*“43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work, Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors.*

*(emphasis supplied)*

No purpose can certainly be served in nipping the contractors, who are otherwise eligible, at the threshold. There cannot be any fair competition, as there would be lesser participants, which is certainly detrimental to the public interest.

State Governments, State Government Undertakings, Corporations, instrumentalities and agencies

are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution, and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

The aforesaid principle has been laid down in various judicial pronouncements starting from much celebrated decision of the Apex Court in the case of **Tata Cellular -v- Union of India**, reported in 1994 SCC (6) 651.

Mr. Mohapatra, learned GA relied upon the case of **Census Commissioner and others Vs. R.Krishnamurthy**, reported in (2015) 2 SCC 796, where the Supreme Court, at paragraph-33, held as under:

*“33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the court is not expected to sit as an appellate authority on an opinion.”*

Similar is not the situation in the case at hand. As discussed earlier, the imposition of APS at the pre-bid stage is arbitrary, unreasonable as well as detrimental to public interest. Thus, the same warrants a judicial review by this Court.

23. Taking into consideration the case laws discussed above, it can be safely concluded that by requiring the bidders to submit APS for each item of the tender at the time of submission of the bid is violative of Article 19 (1)(g) of the

Constitution, being arbitrary and irrational. It does not subserve any public interest; rather it restricts the level playing field in the matter of award of contract.

24. In that view of the matter, the writ petition is allowed to the extent that the condition imposed by Office Memorandum dated 04.05.2016 by amending Para-3.5.5(v) of Note-II of OPWD Code Vol.1 by modifying the same and providing that Additional Performance Security (APS) of the amount of difference between the estimated cost and the cost of bid (if lower than the estimated cost) is to be provided at the time of submission of the bid, is quashed.

The said condition of providing Additional Performance Security of the amount of difference can be imposed only for a successful bidder, which can be required to be provided within such stipulated time as may be provided for, or else the bid of the successful bidder would be cancelled and the security deposit would be forfeited, if permissible in law, and further proceeding for blacklisting would be initiated as per law.



We make it clear that we are not expressing any opinion with regard to Office Memorandum dated 08.11.2013 or with regard to other prayers made in the writ petition, as the prayer for quashing Office Memorandum dated 04.05.2016 alone has been considered. The same may be agitated by filing separate writ petition, if so advised. No order as to costs.

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**(VINEET SARAN)**  
**CHIEF JUSTICE**

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**(K.R. MOHAPATRA)**  
**JUDGE**